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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 165.

JAMES A. AKERS and LELA AKERS, his wife, *Petitioners,*

v.

FRANK SCOFIELD, individually and as Collector of Internal Revenue for the First District of Texas, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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July 19, 1948.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

James A. Akers, and Lela Akers, his wife, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled case April 23, 1948 (R. 40). The Circuit Court of Appeals affirmed a decision of the District Court of the United States (R. 23) denying refunds of income taxes for the years 1932, 1933 and 1936.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered April 23, 1948. Jurisdiction to issue the writ requested is found in Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Mrs. Dora Roberts "made a deal with James A. Akers, whereby she agreed to, and did, advance large sums of money to him for the purpose of acquiring some maps which Akers represented were in existence in Mexico and which would reveal the location, on her ranch, of much buried gold." (R. 40)

"In due course he (Akers) produced a map, and by its pretended use directed the treasure seekers to a designated spot on the Roberts ranch whereat a quantity of metal bars, resembling gold, was dup up. Akers had made, or caused to be made, the map out of his imagination and the 'gold' bars out of brass." (R. 41)

1. Was the money so received by Akers "income" and taxable as such? Or, was it not income and not taxable within the rule of *Commissioner* v. *Wilcox*, 327 U. S. 404, which held that embezzled funds are not income of the embezzler?

SUMMARY STATEMENT OF MATTER INVOLVED.

The facts were stipulated in the District Court. The stipulation appears in full in the record at page 14. The facts may be summarized as follows:

Dora Roberts is a wealthy widow who resides near Big Spring, Texas. In 1932, James A. Akers, the petitioner herein, represented to Mrs. Roberts that he had connections in Mexico with people who were in possession of maps which showed the location of buried treasure on her ranch. Mrs. Roberts agreed to supply all funds necessary to purchase such maps. It was further agreed that Mrs. Roberts and Akers would share equally in the proceeds of all treasure found on her ranch as a result of the maps to be obtained. As a consequence of this agreement, Mrs. Roberts advanced money in varying sums and at various times to Akers to enable Akers to purchase the said maps. Akers, however, did not use the money for the purpose for

which it was received because there actually was no treasure buried on the ranch and there were no maps showing the existence of such treasure. Akers did cause maps to be made and delivered to Mrs. Akers. They showed the location on the ranch where brass bars had been planted by Akers.

The Treasury Department ruled that the money advanced by Mrs. Roberts for the purpose of securing the maps was income of Akers. Suit was brought in the District Court on the ground that under the decision of this Court in *Commissioner* v. *Wilcox*, 327 U. S. 404, the money was not received under a claim of right so was not income.

The District Court was of the opinion that when funds are embezzled as in the *Wilcox* case no title passes, but when funds are obtained under the circumstances of this case, title does pass. Consequently, the Court concluded the money received by Akers was income and taxable. (R. 23, 33)

The Circuit Court of Appeals approved the conclusion of the District Court and added the further reason that equity prevented recovery of the tax paid.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The decision below is in conflict with *Commissioner* v. *Wilcox*, 327 U. S. 404, 34 A. F. T. R. 811. In that case this Court decided that embezzled funds were not income. In deciding the *Wilcox* case this Court stated:

> "• • • a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditioned obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received

any gain or profit within the reach of Section 22(a).[1] * * * Nor can taxable income accrue from the mere receipt of property or money which one is obliged to return or repay to the rightful owner, as in the case of a loan or credit. * * * the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of Section 22(a).

"We fail to perceive any reason for applying different principles to a situation where one embezzles or steals money from another. Moral turpitude is not a touchstone of taxability. The question, rather, is whether the taxpayer in fact received a statutory gain, profit or benefit. That the taxpayer's motive may have been reprehensible or the mode of receipt illegal has no bearing upon the application of Section 22(a)."

We submit that no better language could be written to describe the exact situation presented by the case at Bar. The decision below is clearly in direct conflict with *Commissioner* v. *Wilcox.*

It is absurd to say that Akers ever had title to the money received from Mrs. Roberts. Any Court in the land would have held he had no title and ordered the return of the money to its rightful owner. Yet, the District Court held (R. 34) and the Circuit Court affirmed, that:

"The distinction between theft and embezzlement on the one hand and swindling on the other, is that in the former case title to the property acquired never passes, while in the latter case, title does pass."

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[1] Section 22(a) of the Internal Revenue Code reads:

"Sec. 22. Gross Income.

(a) General Definition.—'Gross Income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

The Courts below failed to recognize that the determination of whether title passed to Akers is dependent upon the intention of the defrauded party (Mrs. Roberts) and not upon the intention of the defrauder (Akers).

In 35 C. J. S. 639, it is stated:

> "• • • The distinction between the crimes of obtaining by false pretenses and larceny lies in the intention with which the owner parts with the property; if the owner, in parting with the property, intends to invest accused with the title as well as the possession, the latter has committed the crime of obtaining the property by false pretenses, but if the intention of the owner is to invest accused with the mere possession of the property, and the latter, with the requisite intent, receives it and converts it to his own use, the crime is larceny."

Mrs. Roberts never intended to give Akers title to any of the money which she put in his possession. To induce her to part with the money, he represented to her that he knew where maps could be purchased. She agreed to advance money to purchase the maps. Akers, using her money, was to acquire these maps from third persons. In this respect, he never acted as a principal but only as Mrs. Roberts' agent.

The fact that all of Akers' representations were fraudulent, that he knew that there were no maps to be obtained and intended at all times to convert the money to his own purpose cannot serve to divest Mrs. Roberts of title to the money. The intent of the offender does not control.

This case is in no way similar to cases involving persons engaged in illegal enterprises because in those cases the recipient receives the money under a claim of right and it cannot be recovered. Illustrations are income from bootlegging,[2] race track bookmaking,[3] gambling,[4] payments

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[2] *U. S.* v. *Sullivan*, 274 U. S. 259, 6 A. F. T. R. 6753.

[3] *James P. McKenna*, 1 B. T. A. 326.

[4] *L. Weiner*, 10 B. T. A. 905.

to union officials to prevent obstruction of prompt loading of cargoes on vessels,[5] and many similar situations.

II.

The lower Court, in addition to denying the applicability of the *Wilcox* case said the petitioner could not recover because (R. 44):

> "Appellants are the movers in this case, and, as such, must carry the burden of showing their right to equitable relief, *ex aequo et bono*. It seems clear in this case that they have not a case in which, under equitable standards, they are entitled to succeed."

Stated another way, the Circuit Court held that if the government collects money under the guise that it is a tax on income the payer cannot recover even though there was in fact no income, because the manner of the receipt of the money was reprehensible.

To permit the government to retain money collected as tax, when no income was realized and no tax due, would, in effect, put the government in as unsavory a position as the petitioner. "* * * the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of Section 22(a)".[6]

If there was in fact no income, "equity" cannot possibly make the receipt of money income.

The "equity" cases relied upon by the Court below all deal with situations involving valid taxes. Such cases in no way control the case at bar, where no valid tax is involved. In addition, they all deal with situations where there is equity between the parties to the action. By that is meant that a taxpayer, or someone in privity with him, has misled the Government to the detriment of the Government.

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[5] Richard Law, 2 T. C. 623.

[6] *Commissioner* v. *Wilcox*, 327 U. S. 404.

For instance, *Stone* v. *White*, 301 U. S. 532, 19 A. F. T. R. 503, cited by the Court below, held that trustees who had paid a tax on the income of a trust estate which should have been paid by the beneficiary were not entitled to recover the tax where the Government's claim against the beneficiary was barred by limitation.

The decision of the Court below on "equity" is in conflict with all established law of taxation. If permitted to stand it can lead only to confusion and litigation.

III.

The case presents an important question of Federal law which should be settled by this Court. The Treasury Department is presently engaged in a "drive" on tax evaders. In an astonishingly large number of cases it is claimed that, because of the *Wilcox* decision, the money sought to be taxed is not income.[7] The Treasury attempts to limit the application of the *Wilcox* rule. If the rule is subject to limitation the Court should define the limitations and reduce litigation on this question.

Respectfully submitted,

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July 19, 1948.

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[7] The Prentice-Hall Federal Tax Citator shows that the *Wilcox* case has been cited more than 25 times. This is true even though the case was decided February 25, 1946.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 165

JAMES A. AKERS AND LELA AKERS, HIS WIFE, PETITIONERS

v.

FRANK SCOFIELD, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the District Court (R. 23-35) are reported at 73 F. Supp. 553. The opinion of the Circuit Court of Appeals (R. 40-44) is reported at 167 F. 2d 718.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 23, 1948. (R. 45.) The petition for a writ of certiorari was filed July 19, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether money which Akers received from Mrs. Roberts by defrauding her was taxable income to Akers and his wife within the meaning of Section 22(a) of the Revenue Acts of 1932 and 1936.

STATUTES INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Section 22(a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, is identical.

White's Annotated Penal Code of Texas, Article 943:

> "Swindling" is the acquisition of any personal or movable property, money or instrument of writing conveying or securing a valuable right by means of some false or deceitful pretense or device, or fraudulent representation with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the rights of the party justly entitled to the same.

STATEMENT

The District Court's findings of fact (R. 24-32), which consist of a verbatim statement of the facts as stipulated by the parties (R. 14-23), may be summarized as follows:

James A. Akers and Lela Akers, his wife, reside in Bexar County, Texas. (R. 24.) They filed no income tax returns for the years 1932 to 1935, inclusive. For the calendar year 1936 they filed separate, individual returns in which each reported net community income in the amount of $2,365.54 with no tax due. On or about December 6, 1940, acting by and through John Edward Doyle, attorney in fact, they executed waivers of restrictions on assessment and collection of deficiencies in tax for 1932, 1933, and 1936, respectively (R. 27), and the Commissioner subsequently assessed deficiencies against them for those years

(R. 26). They later paid portions of the deficiencies, filed claims for refund which were rejected by the Commissioner, and instituted suit for refund in the District Court. (R. 25-27.)

The deficiencies were based upon the receipt by Akers of money fraudulently obtained by him and one H. L. Forrest from Mrs. Dora Roberts. (R. 28-30.) The suit for refund is based upon the claim that this money while admittedly received by Akers, was not taxable income to him and his wife. (R. 3-5.)

The unlawful evasion of tax on amounts received by Akers from Mrs. Roberts in 1933 to 1936, inclusive, formed the basis of a criminal action against Akers in 1940. (R. 30.) He pleaded guilty to Counts 1 and 4 of the indictment, covering the years 1933 and 1936, whereupon Counts 2 and 3 were dismissed. He was sentenced accordingly, the sentence on Count 4 being suspended for two years on condition that he not attempt to transfer title to any of his property until his tax liability was settled and that he make a full, fair disclosure of his affairs and assets to the Internal Revenue agents. (R. 24-25.)

The money obtained from Mrs. Roberts was received by Akers under the following circumstances:

Mrs. Dora Roberts, a very wealthy widow now over 82 years of age, has for many years owned a ranch in the southeast part of Howard County, Texas, consisting of approximately 36 sections.

During the year 1929 H. L. Forrest was on her ranch discussing oil leases with her, during which time she mentioned to him that for many years she had heard there was gold buried on her ranch near a hill called Signal Hill. (R. 28.)

During the latter part of 1932 Forrest and Akers contacted Mrs. Roberts on her ranch and Forrest introduced Akers as J. B. Bryant, under which name Mrs. Roberts knew Akers throughout the following transactions. Forrest represented to Mrs. Roberts that Akers (Bryant) had connections in Mexico with people who were in possession of maps which would indicate the exact location of buried treasure on her ranch. Akers and Forrest induced Mrs. Roberts to advance $1,600 for the purpose of enabling Akers to go to Mexico and seek to purchase the maps, although at that time they well knew that no such maps were in existence and that no treasure was buried on the Roberts ranch. They made the representation solely for the purpose of inducing Mrs. Roberts to part with her money. (R. 28.)

On or about September 15, 1932, Akers and Forrest returned and represented to Mrs. Roberts that Akers had successfully procured one of the maps. Armed with the map, Akers, Forrest, Mrs. Roberts and her son-in-law, W. G. Garrett, proceeded to the ranch where Akers, after referring to the map, directed the party to a designated spot where they dug up a quantity of metal bars which resembled gold. The bars were taken to the home

of Mrs. Roberts in Big Spring, Texas, for safekeeping and it was agreed that she and Akers were to share equally in the proceeds of the sale of all treasure found and which was to be found as a result of information obtained by Akers. It was further agreed that Mrs. Roberts was to bear all expenses in connection with procuring such information, including paying for any maps which were to be procured by Akers or Forrest. (R. 28-29.)

Akers then represented to Mrs. Roberts that he could secure another map disclosing the location of other buried treasure and Mrs. Roberts agreed to purchase the map. Akers left and later returned to Big Spring on or about September 30, 1932, and proceeded to the home of Mrs. Roberts. Akers represented to Mrs. Roberts that he had secured the map at a cost of $4,000, which amount Mrs. Roberts delivered to him. On or about October 1, 1932, Mrs. Roberts, Garrett, Akers and Forrest returned to Mrs. Roberts' ranch and under the direction of Akers proceeded to a point near Signal Hill where a quantity of metal bars were unearthed. These bars, as before, were taken to Mrs. Roberts' house in Big Spring and concealed in a closet. (R. 29.)

Nine other occasions similar to the latter occurred in 1932 and 1933. On each occasion Akers pretended to have procured a map and under his direction the parties proceeded to the ranch where metal bars were dug up. (R. 29-30.)

On February 3, 1934, Akers telephoned to Mrs. Roberts long-distance from Monterrey, Mexico, stating that he had obtained another map which could be bought for $6,000. Such amount was delivered to Akers for such purpose. Similar transactions occurred between the parties during the years 1934, 1935 and 1936. (R. 30.)

During the years set out below the following amounts were delivered to Akers by Mrs. Roberts under the same circumstances (R. 30):

1932	$43,100
1933	35,100
1934	97,500
1935	64,000
1936	32,500

All of the money so received was divided between Akers and Forrest. All money received by Akers from Mrs. Roberts was retained and currently used by him and no part was ever repaid to Mrs. Roberts or paid to anyone else by her order. (R. 30-31.)

At all times when Akers represented to Mrs. Roberts that the money advanced by her was to be used to purchase or procure maps from sources in Mexico, he was aware that no such maps in fact existed and his statements were made for the sole purpose of defrauding Mrs. Roberts of her money. (R. 30-31.)

The metal bars which were dug up by the parties on the occasions mentioned were of brass, having

a total weight of approximately 5,833 pounds. These bars were, upon the direct order of Akers, made by the Acme Brass and Foundry Company, San Antonio, Texas, at a cost of 18 cents per pound. Prior to the occasion of the parties' unearthing the metal bars, Akers would proceed to a location on the Roberts Ranch and bury them. (R. 31.)

The maps which Akers pretended to have purchased in Mexico were never seen by anyone save Akers and Forrest and were nothing more than Akers' own memoranda as to where he had buried the metal bars. (R. 31.)

During February of 1935 Akers told Mrs. Roberts that the "gold" which had been stored in Mrs. Roberts' house could be sold in Galveston. After pretending to have made definite arrangements for the sale of the "gold", Akers, while driving a truck containing the metal, was apparently "hijacked" near Richmond, Texas, and the "gold" stolen. (R. 31.)

On September 27, 1936, Mrs. Roberts first discovered the fraud and ceased paying any further sums to Akers or Forrest. She felt ashamed of having permitted herself to be so defrauded and for that reason did not advise any law-enforcing authority that she had been defrauded. She did not demand the return of the money she had delivered to Akers or Forrest, did not institute any action, legal or otherwise, for the return of the money, and never contemplated any such demand

or action. No legal action for the return of any of the money so delivered to Akers or Forrest could have been maintained after September 27, 1938, because action would have been barred by the two-year Texas statute of limitations. (R. 31-32.)

On the basis of these facts, the District Court held that Akers' share of the money received from Mrs. Roberts was taxable income to him and his wife. (R. 33-35.) The decision was affirmed on appeal. (R. 40-44.)

ARGUMENT

1. Contrary to taxpayers' contention (Pet. 3-6), the decision below is not in conflict with this Court's decision in *Commissioner* v. *Wilcox,* 327 U. S. 404. In the *Wilcox* case the Court held that embezzled funds were not taxable income to the embezzler, because he had received the funds without any semblance of a bona fide claim of right, he was at all times under an unqualified duty to repay the money to his employer, the employer at all times held him liable to return the full amount, the debtor-creditor relationship was definite and unconditional, and all right, title and interest in the money rested with the employer. The present case, on the other hand, involves swindling, a crime which consists of the obtaining of money by false representations of an existing or past fact by virtue of which, since the defrauded person does not expect a return of the money or

its equivalent, title to the money passes to the swindler. See Penal Code of Texas, Art. 943, supra, p. 3; Bink v. State, 50 Tex. Cr. R. 445; *Lewis* v. *State,* 75 Tex. Cr. R. 509; *Gordon* v. *State,* 85 Tex. Cr. R. 641; *Hodges* v. *State,* 138 Tex. Cr. R. 296; *Johnson* v. *State,* 144 Tex. Cr. R. 392; *Whitehead* v. *State,* 148 Tex. Cr. R. 190, 195.

On each occasion on which Mrs. Roberts turned over money to Akers she turned the money over to him on false representations that he could obtain a map showing where treasure was buried on her ranch. Also, on each occasion Akers later falsely represented that he had obtained such a map and Mrs. Roberts, believing that he had, did not expect a return of the money she had given him. No definite and unconditional debtor-creditor relationship was established between them. Contrary to taxpayers' contention (Pet. 4-5), Mrs. Roberts plainly intended to and did pass title to the money to Akers. Unlike the embezzled funds involved in the *Wilcox* case, the money was received by Akers under a claim of right and without any definite, *unconditional* obligation to return it to Mrs. Roberts. To be sure, Mrs. Roberts probably could have recovered the amounts from Akers prior to the running of the period of limitations, but, until she might seek to enforce her cause of action, the funds were legally held by Akers as against the world, and therefore constitute taxable income to him within the test

stated in *North American Oil* v. *Burnet*, 286 U. S. 417, 424, and reiterated in the *Wilcox* decision. Cf. *Moore* v. *Thomas*, 131 F. 2d 611 (C.C.A. 5th); *Caldwell* v. *Commissioner*, 135 F. 2d 488 (C.C.A. 5th).

2. Taxpayers urge (Pet. 6-7) that the court below erred in holding (R. 44) that in their suit for refund taxpayers had the burden of showing that they were entitled to recover under equitable standards; but even if correct, this contention would not appear to present an adequate reason for the granting of certiorari. The case was first decided by the court below on its merits (R. 42-44) and if the holding in that connection is correct, as we submit it is, affirmance of the judgment below is required regardless of the correctness of the additional views of the court below with respect to the equitable features of the case.

CONCLUSION

The decision below is correct and does not involve any conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST, 1948.

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